

The Insurmountable Trade-Off:

Efficiency vs Human Rights in the Area of AI

Guiding question: must we use algorithmic decision-making in the public sector?

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About me:

- Doctoral student of ao. Univ.-Prof. MMag. DDr. Erich Schweighofer
- Project: COMISO - Crisis Management using Multimodal Interaction for Stakeholders and Citizens
 - Topics: effective interaction and crisis management, NLP & ethics
- Dissertation: Legal Implications of the Use of Scoring- and Evaluation- Algorithms from an Austrian Perspective
 - Topics:
 - Constitutional law (public interests such as innovation, **efficiency**)
 - Regulation systems (sandboxing, additional norms like in Germany)
 - Effective enforcement (p.ex. collective enforcement) in administrative and private law

Background Information:

Austria's employment agency rolls out discriminatory algorithm, sees no problem

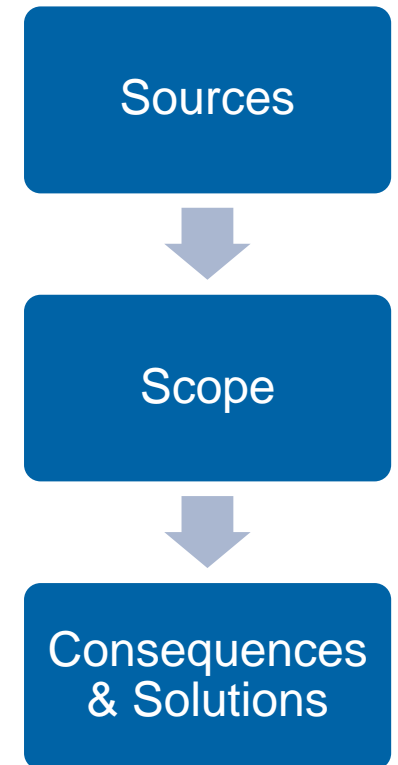
Algorithmic Decision Making (ADM) in the Administration

- For now: mostly pilot projects
- Fundamental question: should we let algorithms decide?
 - Criticism from media and academia
 - Reasoning by those responsible: efficiency gains
 - German Data Ethics Commission: possible legal obligation to automate because of the efficiency principle



Overview

- Objective: apply this argument to algorithmic decision making (in Austria)
- Outline:
 1. Sources of the Efficiency Principle
 2. Scope
 3. Consequences in the light of data protection law
 4. Solutions to detected problems



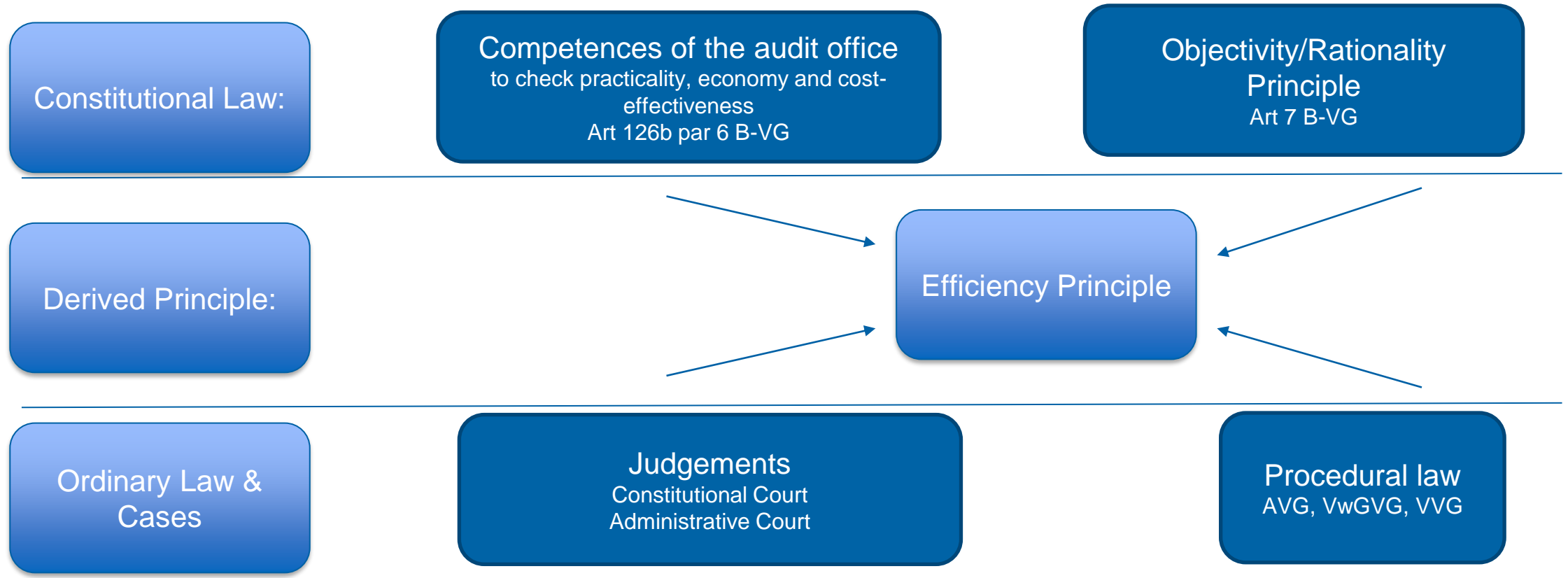
Definition of Efficiency

- Different approaches (allocative efficiency, Kaldor-Hicks-efficiency, technical efficiency etc.)
- Efficiency \neq effectivity
- *Potacs* and Economic Analysis of the Law: input must be in a reasonable relation to the output \rightarrow “optimization principle”
- Linked words used in the legal context: practicability, economical, cost-effective, timesaving

Common Ground:

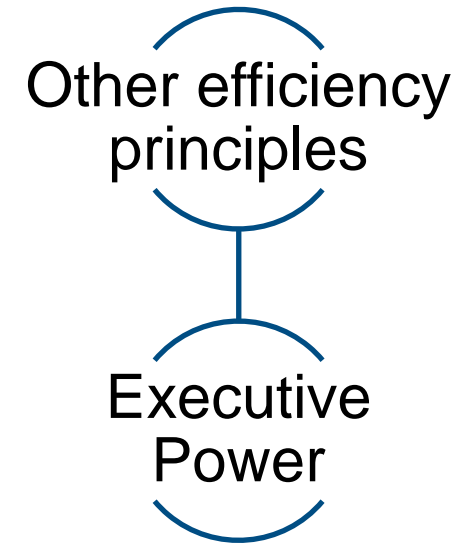
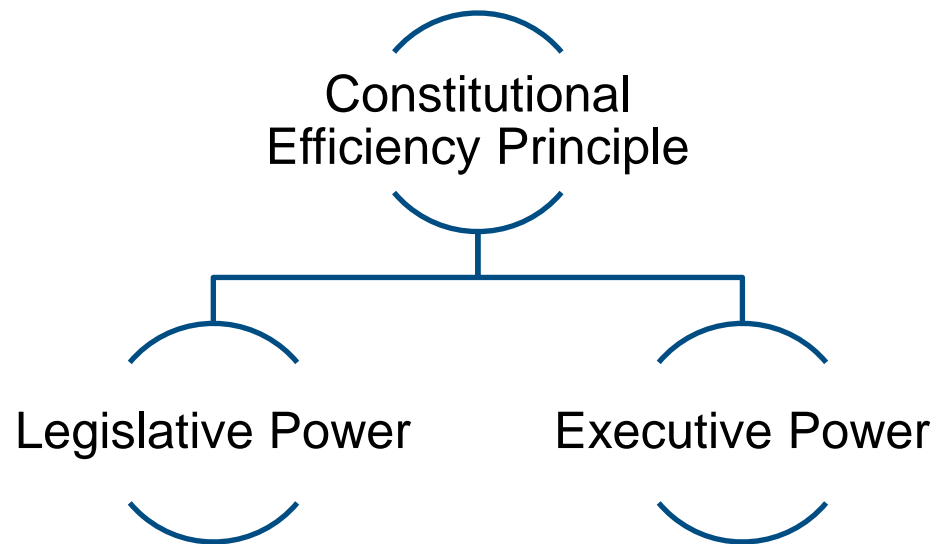
$$E \% = \frac{\text{Output}}{\text{Input}} * 100$$

Sources



Scope

According to the Constitutional Court



Consequences

- Efficiency = constitutional principle & public interest
- Constitutional principles & public interests can justify interferences in fundamental rights
- Accepted theory: graduated efficiency (e.g. Art 6 ECHR vs Art 1 AP 1 ECHR)
- Administration must choose the most efficient (optimal) alternative → arg.: must employ ADM, insofar as it is more efficient (optimal)
- BUT: efficiency principle can also make the use of ADM unconstitutional (objectivity/rationality principle)

Factors for Optimization/Efficiency Gains through ADM

+ Faster Procedure

- Less Human
Resources

+ Possible Human
Rights Interferences

$$E \% = \frac{\textit{Output}}{\textit{Input}} * 100$$

Indirect
Consequences ?

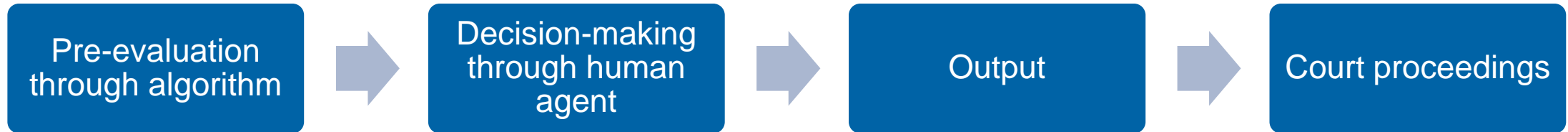
+ R&D Costs

+ Implementation &
Server Costs

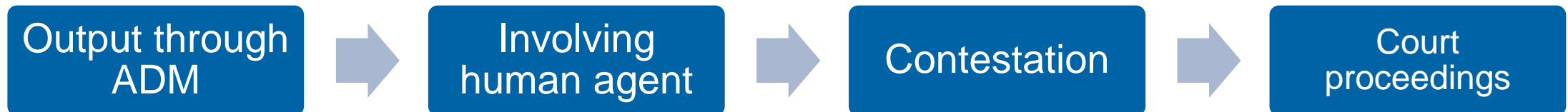
+ Expertise &
Consulting

Implementation of ADM (Privacy)

- Possibility 1 (Art 22 GDPR shouldn't apply)



- Possibility 2 (Art 22 GDPR does apply)



Possibility 1

- Pro:
 - Possibility to prevent human rights violations
- Contra:
 - Human resources needed for first decision
 - Training of agents needed
 - Possible loss of accountability through time (routine work)

Possibility 2

- Pro:
 - Fewer human resources for first decision needed
- Contra:
 - Increased chance of human rights violations
 - Increased chance of lengthy proceedings

Complex Decision
+
Difficult Estimations

→ Who should be
the judge?

Solving the dilemma

- Complex assessment
- Constitutional Court: prerogative to judge efficiency lies with the legislative power
- Legality principle: administration can only act within the legal framework
- Additional legal norms needed to allow for interferences in human rights
- Desire to base the use of ADM on a democratic decision

→ Solution: „Digital Check“

Digital Check

- Based on *Lachmayers* Efficiency Check:
 - Introduction of a formal procedure within the legislative process to assess possible ways of digitalization of administrative tasks
 - Constitutional Court only judges the adherence to the procedure
 - Other courts can judge the legality of the implementation

Excerpt from the government programme 2020-2024 (Austria):

“Digital check of new laws: Wherever possible, administrative processes, which arise from new laws, should be carried out digitally and – if possible – automated. Existing administrative processes are to be screened with regard to the possibilities for digitisation”